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In the Supreme Court of the United States

HORIZON AIR INDUSTRIES, INC., PETITIONER

v.

NATIONAL MEDIATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL MEDIATION BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly applied the correct standard in reviewing a decision of the National Mediation Board (NMB) that allegedly involves the violation of an employer's constitutional rights.

2. Whether the NMB correctly applied a "totality of circumstances" approach—evaluating both an employer's communications and its conduct to its employees to determine that the employer had interfered with their selection of a collective bargaining representative—and thereby respected petitioner's First Amendment rights.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 232 F.3d 1126. The order of the district court (Pet. App. 29a-30a) is unreported. The order of the National Mediation Board (Pet. App. 31a-90a) is reported at 24 N.M.B. 458.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 2000. The petition for a writ of certiorari was filed on February 13, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1926, Congress enacted the Railway Labor Act (RLA) to provide for the "prompt and orderly settlement" of labor-management disputes and to ensure that employees may decide, with "complete independence" from carrier involvement or coercion, whether to be represented by a union. 45 U.S.C. 151a. Congress subsequently created the National Mediation Board (NMB) to administer the Act, and strengthened the restrictions on carriers' interference, influence, or coercion of their employees' representation choices. Act of June 21, 1934, ch. 691, §§ 1-2, 48 Stat. 1186-1187. Then, in 1936, Congress extended the Act to the airline industry. Act of Apr. 10, 1936, ch. 166, 49 Stat. 1189. The Board has two primary duties: (1) to mediate disputes between carriers and labor organizations, and (2) to determine and certify the employees' choice of a bargaining representative. 45 U.S.C. 152, Ninth, 155, 183.

A union seeking certification as the bargaining representative of a carrier's employees must apply to the NMB and demonstrate a sufficient "showing of interest" by the employees. The NMB will then conduct an investigation to determine the employees' wishes. The details and scope of the investigation, including the decision to hold an election, are left to the NMB's discretion. 45 U.S.C. 152, Ninth. To ensure that "the choice of representatives by the employees [is made] without interference, influence, or coercion exercised by the carrier," 45 U.S.C. 152, Ninth, the NMB requires that "laboratory conditions" be maintained in the workplace after the carrier becomes aware of its employees' interest in seeking a representative. Pet. App. 14a, 88a. The NMB generally will not certify a union unless a majority of the relevant

group of employees casts valid ballots. If a majority does vote, then the union with the majority of votes among those cast wins. If the NMB finds interference by the employer, its action will depend on the severity of the interference. The minimal response is a re-run election with a standard notice to employees.[1]

2. In 1984, petitioner established a "lead captain program," with the stated goal of improving communication between management and pilots. Pet. App. 3a. The program's main body was a committee, elected by and composed of non-management pilots. *Ibid.* Then, in 1988, petitioner placed its policies concerning pilots into a "Flight Crew Policy Handbook" (Handbook) and renamed the lead captain program as the "Pilot Representatives Program" or "PIREPS," which petitioner funded. *Ibid.* PIREPS and petitioner agreed to make the Handbook a binding document, with an effective term of September 1, 1988, through September 1, 1990. *Id.* at 4a. In 1990, PIREPS was formalized through the adoption of bylaws and procedures for election of officers, appointment of committees, and approval of changes to the Handbook. *Ibid.* Also, in 1990 and then in 1993, PIREPS and petitioner negotiated new versions of the Handbook, the last expiring in 1998. *Ibid.*

The International Brotherhood of Teamsters (IBT) began a unionization campaign among petitioner's employees in late 1993 and early 1994. Those efforts were abandoned in mid-1994, but resumed in 1995. Pet. App. 4a. By then, the pilots were dissatisfied with petitioner's handling of a number of work-related changes. *Ibid.* In early 1995, PIREPS discussed those concerns

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[1] *America West Airlines, Inc.*, 17 N.M.B. 79, 102 (1990). In response to more extreme forms of interference, the NMB may adopt additional measures relating to the certification process.

with petitioner. *Id.* at 4a-5a. Relations between PIREPS and petitioner's management rapidly deteriorated. *Id.* at 5a. The PIREPS board resigned after a March 15, 1995 meeting. *Ibid.* The day after the resignation, petitioner's Senior Vice President of Operations sent a letter to the pilots stating that petitioner would "facilitate" an election for a new board. *Ibid.* The pilots subsequently elected a new PIREPS board. *Ibid.*

On March 30, 1995, an IBT newsletter announced a new unionization campaign. Pet. App. 5a-6a. On April 3, petitioner's Senior Vice President of Operations wrote to the pilots to stress its commitment to improvement, and to announce a number of changes that would be implemented immediately. *Id.* at 6a. Those changes included hiring and training to alleviate pilot shortages; increases in "premium pay" rates; lengthened rest hours; increased compensation for PIREPS members, once elected; and the hiring of a new liaison officer (a position that combined management-pilot liaison and the safety officer recommended by the Federal Aviation Administration) who would work with the PIREPS board and petitioner's management to implement improvements. *Ibid.* The same executive then sent another letter to the pilots discussing the IBT campaign, describing the forthcoming voting process, and correcting some "errors of fact" in the IBT newsletter. *Ibid.* On June 12, 1995, the IBT officially notified petitioner that it was conducting an organization drive. *Id.* at 7a. Petitioner's new liaison/safety officer wrote to the pilots on June 14 to discuss the IBT campaign—placing it in a context of declining union membership and claiming that a national union would not serve the pilots' best interests. *Ibid.*

Discussions between PIREPS and petitioner continued into June 1995. Pet. App. 7a. In mid-June, petitioner informed PIREPS that petitioner was extending a temporary increase in "premium pay." *Ibid.* In a June 21 letter, petitioner's liaison informed the pilots of several improvements: mandatory rest time would be approved for ten hours, and pilots would now be allowed to remove their neckties in the cockpit. *Ibid.* A postscript included a commentary on asserted inaccuracies in the IBT's campaign literature. *Ibid.* In July 1995, petitioner continued to negotiate with PIREPS on a variety of issues. *Ibid.* Throughout the IBT campaign, the PIREPS newsletter presented articles and letters representing varying perspectives on the unionization debate. *Ibid.*

On September 21, 1995, the IBT applied to the NMB, claiming that there was a representation dispute. Pet. App. 8a. In response, petitioner informed PIREPS on September 29, 1995, that it would not be able to implement any new reform proposals because the company had to maintain the status quo during the representation dispute and election, but would be able to complete improvements that were already underway. *Ibid.* A September 29 letter from the management to all pilots explained that petitioner would "remain 'out of the fray,' * * * and allow you to make your own decisions." *Ibid.* The letter also included the personal convictions of the writer, petitioner's Vice President for Flight Operations, who opined that IBT representation was not in the best interests of the pilots. In October 1995, petitioner's President stated in an interview with an in-house publication that the IBT should be rejected, alleging that unions tend to create an "'us versus them' mentality." *Ibid.*

The NMB authorized an election. Pet. App. 8a. Prior to the election, petitioner's management sent several other letters to the pilots, stressing that while unionization was their choice, management felt that selection of the IBT was against the interests of the pilots and petitioner. *Ibid.* On January 19, 1996, the ballots were counted. Because less than a majority of those eligible had voted, no representative was certified. *Id.* at 9a. On January 23, 1996, the IBT filed a complaint with the NMB alleging interference by petitioner, which the NMB investigated. *Ibid.*

3. Based upon the "totality of the circumstances," the NMB found that petitioner's actions during the IBT's organizing campaign "tainted the laboratory conditions necessary for a free and fair election." Pet. App. 78a. The Board further concluded that petitioner "communicated a clear message to the pilots that it preferred PIREPS * * * to the IBT. [Petitioner] also used the PIREPS program to provide work rule improvements after the carrier learned of the IBT's campaign." *Ibid.*

The NMB explained that it "has previously considered the question of whether a carrier's role in connection with employee committees * * * constitutes election interference and has made its determinations based upon the particular facts of each case," and "has taken the view that the existence of active employee committees * * * is not necessarily improper interference with an election." Pet. App. 79a. As examples of this "totality of the circumstances" approach, the Board then summarized five of its prior decisions involving such committees, including that in *US Airways*, 24 N.M.B. 354 (1997). Pet. App. 80a-82a.

The Board stated that, in *US Airways*, it had "identified initial standards applicable to carrier election con-

duct in the context of employee committees," and "[b]ased upon past precedent" had given "examples of carrier conduct *vis-a-vis* employee committees which interferes with employee freedom of choice." Pet. App. 81a. After listing the five factors,[2] the NMB "noted that the examples were designed to provide 'general guidance concerning carrier actions in connection with employee committees.'" *Id.* at 82a (quoting *US Airways*, 24 N.M.B. at 386). The Board stated that "[t]hese examples [(each of which had been engaged in by U.S. Airways)] are not exclusive, and any of them may be considered when evaluating carrier conduct during an election campaign." *Ibid.*

Turning to the present case, the NMB stated that "[a] carrier is free to communicate its views regarding representation in a non-coercive manner during an election," but that "a carrier's right to communicate 'is not without limit, and even conduct which is otherwise

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[2] 1) The establishment of a committee at any time after the carrier becomes aware of a labor organization's organizing efforts;

2) A material change, or a carrier representation of such a change, during the critical period in the purpose or activities of a pre-existing committee;

3) The use of a pre-existing committee to expand employee benefits during the critical period (the continuation of existing benefits is a prerequisite of a fair election);

4) Carrier campaigns which indicate a preexisting committee is, or should be, a substitute for a collective bargaining representative;

5) Carrier campaigns which indicate that the certification of a labor organization as the representative of the employees will lead to the termination of a preexisting committee.

Pet. App. 82a.

lawful may justify remedial action when it interferes with a representation election.'" Pet. App. 85a. The NMB then stated that "[petitioner's] communication of the message that the PIREPS program is a substitute for unionization is a factor leading to the Board's finding" of interference. *Ibid.*

The NMB then addressed other factors underlying its decision. Pet. App. 85a. The NMB noted that "the PIREPS Board, which had been complaining that it had difficulty gaining management's attention during the Winter of 1995, received significant attention from [petitioner's] management"—"creation of the Director Safety/Pilot Communications" and attendance by "top management" at "several PIREPS meetings." *Ibid.* Moreover, the Board found, petitioner "used the PIREPS program to implement work rule changes during the IBT'S campaign." *Ibid.* The Board explained that "PIREPS was able to achieve changes to the [Handbook] on several issues that had been longstanding problems for the pilots." *Ibid.* Thus, the NMB stated, "[t]hroughout the IBT's organizing drive, [petitioner] continuously made agreements with the Pilot Representatives which resulted in either small increases in pay * * * or in work rule changes long sought by the pilots." *Id.* at 85a-86a. Relating those actions to petitioner's communications, the Board stated that while petitioner's "grant of benefits * * * during the organizing drive were minimal, when combined with * * * communications about the benefits, they effectively continued to reinforce the message that the PIREPS program could get immediate positive results for the pilots." *Id.* at 86a-87a. Thus, the Board found that "the grant of these benefits" was a factor in its determination that petitioner had interfered with the IBT's organizing drive. *Id.* at 87a.

The NMB concluded, "[b]ased upon the totality of the circumstances," that "the laboratory conditions required for a fair election were tainted." Pet. App. 88a. The NMB stated that its decision was "based upon its findings that [petitioner] communicated to pilots that the PIREPS Program was a substitute for a collective bargaining representative; used the PIREPS program to provide work rule improvements during the organizing campaign; represented that PIREPS had undergone significant changes that responded to pilot concerns and permitted more impact from the pilots." *Ibid.* The Board "determined these actions to constitute interference with employee free choice." *Ibid.* It therefore ordered a new election, in connection with which petitioner was required to post a notice as to the finding of interference, and to refrain from further such interference. *Ibid.* The second set of ballots was counted on September 12, 1997, and the IBT was certified as the pilots' bargaining representative on September 17, 1997. *Id.* at 10a.

Petitioner then filed suit in federal district court, alleging that the NMB had exceeded its authority and violated the employer's First and Fifth Amendment rights. Pet. App. 10a. The district court granted summary judgment in favor of the NMB and, without opinion, dismissed the case. *Id.* at 29a.

4. The court of appeals affirmed. Pet. App. 1a-28a. The court first addressed its "jurisdiction to review NMB actions." *Id.* at 10a (capitalization omitted). The court recognized that "[f]ederal court jurisdiction over NMB actions is extraordinarily limited." *Ibid.* (citing *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297, 300-301 (1943)). The court explained that "[t]here are two kinds of challenges to NMB action over which federal courts may exercise jurisdiction": first,

"to review allegations that the NMB has acted outside its legislative authority"; and second, "to review allegations that the Board has acted unconstitutionally in carrying out an investigation." *Id.* at 11a-12a.

Further, the court noted, "[w]e take only a 'peek at the merits' to determine if the NMB has committed an error of these dimensions," so that "[u]nless the 'peek' reveals an error that is obvious on the face of the papers without extension to 'arguing in terms of policy and broad generalities as to what the Railway Labor Act should provide,' the court is without jurisdiction to proceed further." Pet. App. 12a. The court then stated that it "adopted the 'peek' framework—for both statutory and constitutional claims—because it 'furthers the purpose of the RLA' to obtain the speedy resolution of representation disputes without the 'haggling and delays of litigation' that a full review on the merits would create." *Ibid.*

As to the constitutional claims, the court observed that "this court, the D.C. Circuit, and the Sixth Circuit have all stated in dicta that the same 'peek at the merits' approach should be used." Pet. App. 13a.[3] The court went on, however, to note that more recently "the D.C. Circuit rejected its own earlier dicta" by holding that "constitutional challenges should be examined on

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[3] See Pet. App. 13a (citing *America West Airlines, Inc.* v. *National Mediation Bd.*, 119 F.3d 772, 775 (9th Cir. 1997) (quoting *Brotherhood of Ry. & S.S. Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 671 (1965)), cert. denied, 523 U.S. 1021 (1998)); *Professional Cabin Crew Ass'n* v. *National Mediation Bd.*, 872 F.2d 456, 459 (D.C. Cir.), cert. denied, 493 U.S. 974 (1989); *Brotherhood of Maint. of Way Employees* v. *Grand Trunk W. R.R.*, 961 F.2d 1245, 1249 (6th Cir. 1992)). See also *Russell* v. *National Mediation Bd.*, 714 F.2d 1332, 1339 (5th Cir. 1983), cert. denied, 467 U.S. 1204 (1984).

their 'full merits.'" *Ibid.*[4] The court noted the D.C. Circuit's statement that "[c]onstitutional arguments cannot sensibly be restricted to the plain text of the clause at issue." *Ibid.* The court cited the need to "check improper NMB actions without causing undue delay in the determination of valid labor representation," and "reaffirm[ed] [its] earlier reasoning and decline[d] to adopt the D.C. Circuit's approach." *Id.* at 13a-14a.

After rejecting petitioner's statutory claims (Pet. App. 14a-17a),[5] the court turned to its claims of First Amendment violations (*id.* at 19a-28a).[6] With regard to petitioner's claim "that the NMB's finding of election interference violated [petitioners'] First Amendment rights by punishing it for engaging in 'pure speech,'" the court noted that in contrast to petitioner's brief, its oral argument "focused on both the NMB's order concerning the first election and on the second election independently." *Id.* at 19a. Specifically, the court

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[4] *U.S. Airways, Inc.* v. *National Mediation Bd.*, 177 F.3d 985, 990 (D.C. Cir. 1999).

[5] The court of appeals rejected petitioner's claim that the NMB exceeded its statutory authority "when it sent a notice to [petitioner's] pilots stating that the carrier had interfered in the election to determine the employees' representative." Pet. App. 14a. The court held that the notice was not an "unauthorized *adjudication* of an unfair labor practice." *Ibid.*

[6] Petitioner also claimed that the order of the NMB requiring the carrier to post the notice the Board had sent to employees discussing the need for a second election deprived the carrier of due process because "it 'appeared [petitioner] was forced to admit past unfair labor practices to all employees.'" Pet. App. 17a. The court of appeals rejected that argument on the grounds that "the notice * * * did not present the NMB's finding as an adjudication of the interference issue," and did not "appear to have been issued by the company itself." *Id.* at 18a.

noted, petitioner "claim[ed] (1) that the NMB's order concerning communications prior to the first election impermissibly punished speech that was protected by the First Amendment, and (2) that [petitioner] was subjected to a prior restraint * * * during the second election, since the NMB's findings concerning the first election effectively circumscribed the content of the carrier's speech during the second election." *Ibid.* For those arguments, petitioner relied on *U.S. Airways, Inc.* v. *National Mediation Board*, 177 F.3d 985 (D.C. Cir. 1999), decided between the close of briefing and oral argument in this case.

The court below explained that, in *U.S. Airways*, "the NMB was concerned with U.S. Airways' relationship to and use of employee committees during a unionization campaign" and that, "[i]n response, the NMB articulated and applied a five-factor test concerning carrier manipulation of employee committees." Pet. App. 20a; see note 2, *supra* (setting forth the five factors). The factors, the court explained, described "different kinds of conduct regarding such committees that should be considered when determining, under the totality of the circumstances, whether the carrier had sullied the 'laboratory conditions' required for an election[.]" Pet. App. 20a. Under that test, the court stated, the NMB "found that U.S. Airways had interfered in the election, and ordered a re-run election." *Id.* at 21a.

The court noted that the D.C. Circuit had applied the "rule" adopted by this Court in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969),[7] to the NMB's five-factor

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[7] The court below previously had quoted that rule, which stated that "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views

standard. Pet. App. 22a. The court explained that the D.C. Circuit "approached the list of factors disjunctively, and found that factors four and five acted independently * * * to restrain the employer's speech." *Ibid.* The court further explained that the D.C. Circuit had "found that these factors regulated pure speech, and that they were overly broad [under *Gissel*], since they did not distinguish between communications that made (permissible) objective predictions and (impermissible) subjective predictions about the consequences of the election's outcome." *Ibid.* Thus, the D.C. Circuit had "found that the carrier's speech had been unconstitutionally chilled." *Id.* at 22a-23a.[8]

Turning to the present case, the court of appeals noted that "the NMB applied the same five factors" and had "relied in part on three of the five factors to conclude there had been interference by [petitioner] in the [first] election: (a) the fact that [petitioner] 'sought to convince the pilots that PIREPS was a substitute for a collective bargaining representative' (factor four);

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about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit' "; and that the communication "may even make a prediction as to the precise effects he believes unionization will have on his company," if "phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at . . . in the case of unionization." Pet. App. 21a-22a (quoting 395 U.S. at 618).

[8] The court noted that, on remand, the NMB had "clarified its finding of interference" by concluding that "the Carrier engaged in conduct, independent of the Carrier's constitutionally protected speech, which tainted the laboratory conditions essential to representation elections by interfering with the employees' selection of a collective bargaining representative." Pet. App. 23a.

(b) [petitioner's] use of the PIREPS program to implement changes in working conditions during the critical period (factor three); and (c) [petitioner's] representation 'that PIREPS had undergone significant changes that responded to pilot concerns and created more input from pilots' (factor two)." Pet. App. 23a-24a. The court further stated that "[t]he Board stressed that its findings were '[b]ased upon the totality of the circumstances'" and had "used only one of the factors discussed by the D.C. Circuit (factor four) in making its findings regarding [petitioner]." *Id.* at 24a.

The court then determined that it "must decide two issues": (1) "whether the NMB's order finding interference in the first election violated [petitioner's] free speech," and "if we determine that there was no constitutional violation regarding the NMB's invalidation of the first election," (2) "whether the NMB's order had an impermissible chilling effect on the carrier during the second election." Pet. App. 24a. As to the first issue, the Court "h[e]ld that the Board's finding that there was carrier interference was not based solely on the carrier's speech." *Ibid.* The court stressed that it did "not follow the D.C. Circuit's treatment of the NMB's five factor test." *Ibid.* In particular, the court stated that "[t]he *U.S. Airways* court found that the NMB's factors must be read disjunctively, since the Board had not made clear whether any one of the factors, standing alone, would have amounted to interference." *Ibid.* The court noted, however, that "[i]t is established NMB practice to examine the 'totality of the circumstances' in order to determine whether a carrier has interfered with a representation election." *Ibid.* Given that practice, the court concluded that "the most plausible reading of the NMB's five factor standard treats

the factors as examples of specific conduct the Board considers alongside others when making its 'totality of the circumstances' finding." *Id.* at 25a. The court further stated that "[n]one [was] presented as independently dispositive," and that here, "the NMB order repeatedly referred to the aggregate effects of [petitioner's] speech-related activities and interfering conduct." *Ibid.*

Thus, the court concluded, "[a] rational employer reading the NMB's order would have understood the standard being applied here; it was the traditional 'totality' test, refined in the context of employer-sponsored committees." Pet. App. 25a. In this regard, the court noted that "[a] set of NMB cases decided before the Board articulated its five-factor test in *U.S. Airways* supports this interpretation," in that "[i]n each case, the NMB examined the totality of the circumstances when considering whether carriers manipulated employee committees." *Ibid.* The court reasoned that, "[g]iven this context, there was no reason for [petitioner] to interpret the NMB's order as a major, unconstitutional change from the past; instead, the order articulated a set of factors that could be used when considering whether an employer interfered, under the totality of the circumstances, with their employees' choice of a representative." *Id.* at 25a-26a. The court then explained that "[b]ecause we do not treat the factors disjunctively, we need not comment on, or apply, the *Gissel* standard, used by the D.C. Circuit in *U.S. Airways*," but observed "that standards like *Gissel*, developed in the NLRA context, must be very carefully imported into the RLA context." *Id.* at 26a n.7.

Addressing the second free speech issue, the court stated that it was "similarly unconvinced that the

carrier was subjected to a prior restraint on speech during the second election." Pet. App. 26a. "In *U.S. Airways*," the court explained, "the D.C. Circuit stressed that the carrier made a request for a temporary restraining order ('TRO') following the NMB's invalidation of the initial unionization election." *Id.* at 26a-27a. Here, by contrast, petitioner "did not file for a TRO, but waited for the results of the second election," and "[o]nly when the outcome of the second election was against its interests, did [petitioner] file suit." *Id.* at 27a. The court stated that, "[a]llowing a carrier to wait to press its claim until after it has lost the second election would be contrary to Congressional intent in establishing the NMB," that is, "to dispose of certification disputes quickly and efficiently." *Ibid.*

ARGUMENT

1. The decision below is correct, and the asserted conflict does not warrant resolution by this Court. There is only a semantic conflict between the court of appeals and the D.C. Circuit over whether the "peek-at-the-merits" approach applies to the determination of jurisdiction to review alleged constitutional violations by the NMB.[9] In fact, both courts adjudicated the merits of the constitutional issues. Moreover, the

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[9] Use of the "peek-at-the-merits" approach is not confined to cases involving jurisdiction to review orders of the NMB. The approach is used elsewhere: (1) jurisdiction (see, *e.g.*, *Powell* v. *Ridge*, No. 00-1711, 2001 WL 337209, *4 (3d Cir. Apr. 6, 2001); *Investment Annuity, Inc.* v. *Blumenthal*, 609 F.2d 1, 9 (D.C. Cir. 1979), cert. denied, 446 U.S. 981 (1980)); (2) transfer of a case (see, *e.g.*, *Haugh* v. *Booker*, 210 F.3d 1147, 1150 (10th Cir. 2000); *Phillips* v. *Seiter*, 173 F.3d 609, 610 (7th Cir. 1999)); (3) retroactivity (*Hardy* v. *Wigginton*, 922 F.2d 294 (6th Cir. 1990)); and (4) preliminary injunction or petition for a stay (*Lead Indus. Ass'n* v. *EPA*, 647 F.2d 1184, 1187 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980)).

actual scrutiny by the court of appeals was at least as, if not more, rigorous than that of the D.C. Circuit.[10] Until such time as it might become evident that any difference in articulation represents a meaningful difference in the substantive evaluation of constitutional claims, this Court's review of this issue would be premature and unwarranted.[11]

Further, the decision of the court of appeals is consistent with the decisions of this Court, in particular *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). That decision concerned the First Amendment protection to be accorded pure speech. Here, unlike the D.C. Circuit, the court of appeals properly concluded that the NMB had relied on its well established and constitutionally valid "totality of the circumstances" approach, involv-

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[10] In *U.S. Airways*, the D.C. Circuit itself noted that in a prior decision applying the "peek-at-the-merits" approach in a "constitutional challenge to an NMB decision" (177 F.3d at 990, citing *International Ass'n of Machinists* v. *TWA*, 839 F.2d 809, amended, 848 F.2d 232 (D.C. Cir.), cert. denied, 488 U.S. 820 (1988)), the court "engaged in our own research in support of a complainant[] * * *. *[A] fortiori* we evaluated the complainant's claim on its 'full merits.'" 177 F.3d at 990.

[11] It may well be that the opinions of both the court below and the D.C. Circuit misapprehend the role of the "peek-at-the-merits" approach. The opinions fail to distinguish between the determination of whether there is jurisdiction, and the actual decision on the merits. Technically, under the "peek-at-the-merits" approach, a court may preliminarily evaluate the merits of a claim to determine *if* the court has jurisdiction over it. Thus, in a case such as this, the court would decide whether, on the face of the pleadings, petitioner's First Amendment claim is substantial. If the answer is affirmative, then the court would go on to review that claim as thoroughly as it would any other such constitutional claim. We do not believe that this approach significantly jeopardizes the proper vindication of constitutional rights.

ing an assessment of both speech and conduct. *NLRB* v. *Virginia Elec. & Power Co.*, 314 U.S. 469, 478 (1941) ("In determining whether the Company actually interfered with, restrained, and coerced its employees, the [National Labor Relations] Board has a right to look at what the Company has said, as well as what it has done."). And the court of appeals further correctly concluded that each of the five factors listed in the Board's order should not be regarded as an independent basis for a finding of interference. Thus, the court of appeals correctly held that the NMB, evaluating the totality of the circumstances, had respected petitioner's freedom of speech in finding that it had interfered with the first election, and had not chilled petitioner's protected speech in the re-run election.

2. Petitioner overstates the differences in the articulated approaches of the court of appeals and the D.C. Circuit in *U.S. Airways*. In *U.S. Airways*, the D.C. Circuit recognized that "[t]he carrier's campaign prior to the initial election was a potpourri of speech *and* conduct, and the Board's order would have to be evaluated under the theory of *Virginia Electric*," which the court described as involving "the situation where an employer's otherwise protected speech becomes unprotected because the employer *also* engages in conduct tending to coerce." 177 F.3d at 992. The D.C. Circuit, however, "chose[] to focus on U.S. Airways' contention that its expression *leading up to the re-run election* was unconstitutionally restrained." *Ibid.* The court then concluded that each of the five factors listed by the NMB (as well as the notice required to be posted by U.S. Airways), including the fourth and fifth that

encompassed some pure speech protected by *Gissel*,[12] could constitute an independent basis for finding interference. *Ibid.* The court then held that U.S. Airways reasonably assumed that it had to avoid each of the five proscribed activities and that it had no need "to confront the situation where an employer's otherwise protected speech becomes unprotected because the employer *also* engages in conduct tending to coerce." *Ibid.*

In contrast, the court of appeals here addressed *both* "whether the NMB's order finding interference in the first election violated [petitioner's] free speech, requiring us to reinstate the results of that election," *and* "whether the NMB's order had an impermissible chilling effect on the carrier during the second election, requiring us to overturn the results of that election." Pet. App. 24a. By finding no constitutional violation in either respect, the First Amendment analysis by the court below was more searching than that of the D.C. Circuit.

In particular, based on the entire NMB order as well as a survey of the Board's prior decisions, the court was correct to disagree with the D.C. Circuit's disjunctive reading of the NMB's five factors. The court emphasized that "[i]t is established NMB practice to examine the 'totality of the circumstances' in order to determine whether a carrier has interfered with a representation

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[12] "4) Carrier campaigns which indicate a pre-existing committee is, or should be, a substitute for a collective bargaining representative;

5) Carrier campaigns which indicate that the certification of a labor organization as the representative of the employees will lead to the termination of a pre-existing committee." Pet. App. 20a-21a.

election." Pet. App. 24a. The court thus properly concluded that "the most plausible reading of the NMB's five factor standard treats the factors as examples of specific conduct the Board considers alongside others when making its 'totality of the circumstances' finding." *Id.* at 25a. The court further stated that "[n]one [was] presented as independently dispositive," and that here, the NMB order "repeatedly made reference to the totality of the circumstances" and "repeatedly referred to the aggregate effects of [petitioner's] speech-related activities and interfering conduct." *Id.* at 25a-26a. Thus, the court reasoned, "[a] rational employer reading the NMB's order would have understood the standard being applied here; it was the traditional 'totality' test, refined in the context of employer-sponsored committees," so that petitioner had "no reason * * * to interpret the NMB's order as a major, unconstitutional change from the past." *Ibid.* Petitioner does not ask this Court to resolve the conflict over the interpretation of NMB's five factors. Even if the NMB's listing of those factors might have been viewed as having some future inhibitory effect on a carrier's protected speech, the NMB has explicitly stated that, as later held by the court of appeals here, this was not the Board's intent, and that its totality-of-the-circumstances approach remains in effect. *US Airways*, 26 N.M.B. 323, 326-327 (1999).

3. Petitioner's discussion (Pet. 12) of the application of *Gissel* by the court of appeals and the D.C. Circuit (Pet. 12) is inaccurate. Although petitioner correctly states that "[t]he D.C. Circuit noted that the NMB's order regulated pure speech," and applied *Gissel*, Pet. 13, it is incorrect to say that "[t]he Ninth Circuit * * * declined to look behind the Board's recitation that its order was based on the 'totality of the circumstances,'

and accordingly declined to independently evaluate whether or not the Board had unconstitutionally based its order on protected speech." Pet. 13-14. While stating that "constitutional arguments cannot sensibly be restricted to the plain text of the clause at issue" (177 F.3d at 990), the D.C. Circuit narrowly focused on the five factors, whereas the court below considered *all* of the NMB's order, not just a single "recitation," as well as the NMB's prior decisions. Significantly, petitioner quotes the statement by the court below that "we need not comment on, or apply, the *Gissel* standard, used by the D.C. Circuit in *U.S. Airways*" (Pet. 14 n.2), but omits the immediately preceding language: "[b]ecause we do not treat the factors disjunctively." Pet. App. 26a n.7.

4. Contrary to petitioner's claim, this case does not raise the stark issue of a "carrier's right to communicate to its employees its view that a preexisting employee committee should be considered as an alternative to representation by a national union." Pet. i. Nor does it involve a restriction on the employer's right to express a difference in view with the union on the merits of "cooperative employer-employee arrangements as alternatives to the traditional adversary model." Pet. 15. As the D.C. Circuit itself observed in *U.S. Airways*, *Gissel* recognized "that the rights of employers to express their anti-union views must be balanced with the rights of employees to collectively bargain." *U.S. Airways*, 177 F.3d at 991 (citing *Gissel*, 395 U.S. at 617).

Here, the court of appeals correctly held that the NMB had maintained its constitutionally valid evaluation of the totality of speech and non-speech factors to determine whether there was interference with a representation election. The NMB acknowledged that

"[a] carrier is free to communicate its views regarding representation in a non-coercive manner during an election," and simply concluded that, in the circumstances of this case, "[petitioner's] communication * * * that the PIREPS program is a substitute for unionization is *a factor* leading to the Board's finding that the carrier interfered with employee's free choice of representative." Pet. App. 85a (emphasis supplied). The Board then took that factor into account in conjunction with its finding that "[petitioner] used the PIREPS program to implement work rule changes during the IBT's campaign," including "small increases in pay * * * or in work rule changes long sought by the pilots." *Id.* at 85a-86a.[13] Accordingly, "[b]ased upon the *totality of the circumstances* in this case, the Board [found] that the laboratory conditions required for a fair election were tainted." *Id.* at 88a (emphasis added). That fact-based determination presents no issue warranting review by this Court.

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[13] The Board further pointed out that "[petitioner] granted a series of benefits * * * four days after the IBT announced its organizing campaign," benefits that "increased premium pay, expanded the rules for bidding on reserve trips, extended the minimum scheduled rest time and increased compensation for pilot representatives from $100 to $300 per bid period." Pet. App. 86a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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